**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO.2415 OF 2006**

Doddamarg Sahakari Kaju and
Madyark Karkhana Maryadit & Anr. ....Petitioners

V/s.

M/s.Mahalaxmi Developers & Anr. ...Respondents

Mr.S.M. Sabrad for Petitioners.
Mr.A.S. Khandeparkar i/b. Khandeparkar & Associates for Respondent No.1.
Mr.Y.M. Nakhawa APP for the State.

**CORAM : V.M. KANADE, J.**

**DATED : 12th SEPTEMBER, 2007.**

**P.C:-**

1. Heard learned counsel for the Petitioner and learned counsel for the Respondent No.1.

2. The Petitioners/original accused are challenging the order of process which was issued on a complaint which is lodged by the Respondent No.1./Complainant U/s.138 of N.I. Act.

3. Brief facts which are relevant for the purpose of deciding this Writ Petition are as under:-

. Case of the Respondent No.1/Complainant is that Complainant is a reputed and renowned Developers, Engineers and Contractors and that Petitioner No.1/Accused No.1 is a Co-operative Society formed and governed under the Maharashtra Co-operative Societies Act, 1960 and Petitioner No.2/Accused No.2 is a Chairman of the Society and other accused are the Secretary and Directors of Petitioner No.1 and they are all responsible for the day to day affairs of the Society. It is case of the Complainant that Accused wanted to construct industrial buildings at village Girode, Taluka Doddamarg and therefore, they published a public notice in daily 'Tarun Bharat' , Belgaum and invited tenders from registered, recognized reputed contractors. Relying on the said tender notice, the Complainant sent their tender which was accepted by the Accused after all the necessary documents being submitted and money deposited, as required by the Accused. Thereafter, the Accused appointed the Complainant as the Contractor for the civil works which was to be carried out. The Complainant has stated in the complaint that, accordingly, the Complainant started said work after mobilizing required machinery and labour for starting the construction. Thereafter, after work

had commenced, Accused issued a cheque of Rs.6 lacs bearing No.106063 dated 10/11/04 drawn on Janata Sahakari Bank Ltd., Shinoli Branch, Taluka Chandgad. When this cheque was deposited in the Bank, it was dishonoured. The Accused approached the Complainant and asked to redeposit the cheque. When the cheque was re-deposited, again it was dishonoured and, therefore, a statutory notice was issued by the Complainant. A reply was given by the Accused to the said notice in which it was stated that the cheque was forged by the Complainant and that though date of commencement of work was 1st September, 2001, the Complainant had not started work after period of three years and deposited a fraud cheque on 1st December, 2004. It was further stated therein that they would take action against the Complainant.

4. Thereafter, the Respondent No.1/Complainant filed a complaint in the Court of Judicial Magistrate, First Class, Pimpri. Process was issued against the Accused. Against the said order, the Petitioners filed a revision application. However, the said revision application was dismissed. Therefore, the present Writ Petition has been filed.

5. Learned counsel for the Petitioners submitted that the cheque in question was lost and therefore, a letter was written by the Petitioners to the Branch Manager, Janata Sahakari Bank Ltd dated 19th November, 2001 stating therein that the cheque No.106063 was missing from cheque book, which was issued on 8th November, 2001. He submitted that same cheque was deposited by the Complainant in the Bank and therefore, it was clear case of fraud being committed by the Complainant and that no amount was due and payable by the Petitioners to the Respondent No.1/Complainant. He submitted that, therefore, process which was issued was liable to be quashed.

6. In my view, said submissions cannot be accepted. The question whether, in fact, the cheque was missing or not will have to be established during the trial. U/s.139 of N.I. Act. a presumption is raised about genuineness of the cheque and the entire burden of rebutting said presumption is on the Accused. One thing which has to be noted here that in the reply to the statutory notice which was issued by the Complainant, Accused herein have not even stated that the cheque was

missing and that they had informed the Bank by their letter dated 19th November, 2001 and they had merely stated in the reply to the Statutory Notice that the Complainant had not performed work and he had forged the said cheque. It is obvious, therefore, that the Petitioners have taken a different stand in the reply to the notice and in the averments which are made in the Petition. There is no acknowledgment annexed to the letter dated 19th November, 2001. It is, therefore, difficult to rely on the said letter dated 19th November, 2001 and their defence appears to be an after-thought after the complaint was filed by the Complainant and process was issued. Another factor which needs to be noted here that the Petitioners do not dispute the fact that the tender was issued by them and that tender was awarded in favour of the Complainant. The question whether amount which was due and payable and amount stated in the cheque was towards legal liability or not is question which will have to be gone into by the Trial Court after examining evidence which is adduced by both the parties. Section 138 of N.I. Act. was introduced in the N.I. Act and penal liability, therefore, was imposed for dishonour of cheques with an avowed object of ensuring that dishonest persons who issue cheques

without there being any intention of honouring these cheques were made liable under the criminal law in order to ensure that the financial transactions do not suffer any set back. In any case, all the questions will have to be decided by the Trial Court after evidence is adduced by both the parties.

7. It is, therefore, in my view, not necessary to interfere with the order of issuance of process. Sessions Court has given cogent reasons while dismissing the revision application filed by the Petitioners herein. Petition is dismissed and disposed of accordingly.

**V.M. KANADE, J.**